Supreme Court, U.S.
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No. 94-1755

In The
SUPREME COURT OF THE UNITED STATES
October Term 1995

BRETT KOUPAL, by and through his mother and next friend, RENEE KOUPAL,
Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT,
Respondent.

ON WRIT OF CERTIORARI
TO THE SOUTH DAKOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THERE EXISTS A JUSTICIABLE CONTROVERSY SUFFICIENT TO INVOKE THIS COURT'S JURISDICTION.

2. WHETHER THE SOUTH DAKOTA SUPREME COURT ERRED IN FINDING THAT THE ISSUE OF TEACHER TRAINING WAS NOT A RELATED SERVICE AND THEREFORE NOT APPROPRIATE FOR INCLUSION IN AN INDIVIDUALIZED EDUCATIONAL PLAN (IEP) UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sioux Falls School District (District), respectfully requests that the Petition for Writ of Certiorari seeking review of the opinion and judgment of the South Dakota Supreme Court be denied.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is reported at 526 N.W.2d 248 (S.D. 1995). The oral

decision of the South Dakota Circuit Court is set out in Petitioner's Appendix 13a-24a. The written decision of the hearing examiner is set out in Petitioner's Appendix at 25a-33a.

JURISDICTION

Respondent accepts the jurisdictional statement of Petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

20 U.S.C. §§ 1400-1485 (1991) and the accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1991). SDCL Ch. 13-42 and South Dakota Administrative Rules (ARSD) 24:02; ARSD 24:05:13:16; ARSD 24:05:27:01;

STATEMENT OF THE CASE

This action arises out of an appeal from a due process hearing requested by the parents of a student with a handicap, pursuant to 20 U.S.C. §1415(b)(1)(E). The issue was whether the failure to incorporate language mandating specific teacher training into an IEP deprived the student of a free appropriate public education under the IDEA, 20 U.S.C. §§ 1400-1485 (1991).

A hearing examiner entered findings of fact and conclusions of law holding that an IEP was a proper vehicle to incorporate specific teacher training. On appeal to the state circuit court, this decision was reversed. The South Dakota Supreme Court affirmed the opinion of the circuit court holding that teacher training is not a related service and failure to incorporate such into an IEP does not deny the student a free appropriate education. Specifically the South Dakota Supreme Court stated: "[A]lthough providing capable teachers may be implicit in IDEA, Congress left teacher competency in the control of school administrators." Sioux Falls School Dist. v. Koupal, 526 N.W.2d 248, 252 (S.D. 1994).

In this case, there was no issue as to the identification of the student as autistic and therefore entitled to benefits under the IDEA. Likewise, there was no issue as to the evaluation of the student or his educational placement. There was no claim that the student's educational needs had not been properly addressed and met by the District. There was no issue as to the training or competency of the student's past and present teachers. There was no issue as to whether the current teaching methodology (TEACCH) was the appropriate method for teaching the student. The issue was whether the IEP, developed by the IEP committee which included the student's mother, could mandate specific teacher training in that selected methodology in order for a teacher to be competent to utilize that methodology. Further, the issue was whether a failure to include such a mandate deprived the student of

a free appropriate public education. The South Dakota Supreme Court properly concluded that an IEP is not the appropriate vehicle for addressing teacher competency and teacher training is not a related service under the IDEA.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Issues Sought To Be Raised Fail To Establish A Justiciable Controversy Sufficient to Invoke the Court's Jurisdiction.

Article III of the United States Constitution states that federal court jurisdiction arises only over "cases and controversies." Whitmore v. Arkansas, 495 U.S. 149 (1990).

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," Warth, supra, 422 U.S., at 501, 95 S.Ct., at 2206, as opposed to merely "[a]bstract," O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974), and the alleged harm must be actual or imminent, not

> "conjectural" or "hypothetical." Los Angeles v. Lyons, 461 U.S. 95, 101-103, 103 S.Ct. 1660, 1664-1665, 75 L.Ed.2d 675 (1983).

495 U.S. at 155. "Injury in fact" has been defined to be "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Northwestern Florida Contractors v. Jacksonville, ___ U.S. ___, ___, 113 S.Ct. 2297, 2302 (1993).

As noted, there is not an assertion by the student or his mother that the student's educational needs are not being met by the District. There has never been an assertion that the student' teachers are not competent to teach the student. Further, the experts acknowledged that a teacher may be competent to use the selected TEACCH methodology without attending the specific training requested by the student's mother. As such not only is there no evidence that the student has suffered an actual injury, any claimed "injury in fact" is conjectural or hypothetical and therefore insufficient to invoke this Court's jurisdiction over this case.

Further "[j]usticiability concerns not only the standing of the litigants to assert particular claims, but also the appropriate timing of judicial intervention." Renne v. Geary, 501 U.S. 312, 320 (1991). This relates to the doctrine of ripeness. Again the above facts demonstrate

that the issue raised by Petitioners is not ripe for adjudication.

II. The Issues Sought To Be Raised By Petitioner Are Not Of Sufficient Scope Or Importance to Warrant Review By This Court.

None of the usual factors that might impel this Court to invoke its discretionary jurisdiction to review the decision below are present here. While this case does involve a state court's interpretation of a federal question, contrary to the assertion by Petitioner, that interpretation is not in conflict with any decision of any other state court of last resort or of the United States Court of Appeals or this Court. In fact, the decision of the South Dakota Supreme Court is consistent with this Court's decision in Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982) wherein this Court recognized:

> By passing the (EAHCA), Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the state any greater substance of educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognized that in many instances the

> process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome"... Thus the intent of the (EAHCA) was more to open the door of public education to handicapped children on appropriate terms than to guaranty any particular level of education once inside.

458 U.S. at 192. The South Dakota Supreme Court's decision is likewise consistent with this Court's recognition in Rowley that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" Id. at 208, quoting, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 42.

> We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Id. See also Rettig v. Kent City School Dist., 720 F.2d 463, 466 (6th Cir. 1983), cert. denied, 467 U.S. 1201 (1984).

Further, not one of the cases or hearing examiner opinions cited by Petitioners as inapposite addressed this limited issue of allowing an IEP to mandate specific teaching training and, in essence, allow an IEP committee to determine standards for teacher competence. Therefore to assert that the South Dakota Supreme Court decision is in conflict with those cited decisions is erroneous.

III. In Any Event, The South Dakota Supreme Court Gave Full Consideration To The Issues Before It and Decided Them Correctly.

The requirements for an IEP are set out both in the IDEA itself as well as in the regulations and under state law. 20 U.S.C. §1401(20); 34 C.F.R. § 300.346; ARSD 24:05:27:01. One item to consider and incorporate in to the IEP is that of related services. This term is defined at 20 U.S.C. § 1401(17) and explained at 34 C.F.R. 300.16 and ARSD 24:05:13:16. Teacher certification and training is included in any provision. In fact, it is interesting to note that in 34 C.F.R. 330.16 related services is recognized to potentially include some forms of "parent counseling and training." Therefore, while the federal law does address training, it does so only in the sense of training or counseling for a **parent**. Obviously if teacher training would have been contemplated by the law, the regulations

would not have limited discussion to parent training. The South Dakota Supreme Court properly recognized that teacher training and competency is not a related service under the IDEA.

Further, the IDEA recognized that matters related to personnel training, standards and certification should be left to the states. 34 C.F.R. §§ 300.15; 300.139; 300.153; 300.224; 300.380-382. South Dakota has adopted laws and regulations relating to teacher certification and training. SDCL Ch. 13-42; ARSD 24:02. Determining the appropriate training for teachers is a difficult task even for a state department of education. It is certainly something that should not be left to IEP committees. If the language requested by the parents was permitted in this case, what would stop the next IEP from including a particular degree or a particular course at a particular school?[1]

To attempt to place this language in the IEP deviates from the requirements imposed by the IDEA and the role of an IEP in insuring that a basic floor of opportunity is provided to the handicapped child through related services.

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[1] Petitioners have framed the issue as whether or not a minimum level of training can be set forth in an IEP. This is not the issue as set forth in the official notice of hearing. The issue was whether the teacher would be required to attend the specific 5-day training program prior to working with the student.

The South Dakota Supreme Court was correct when it recognized: "A parent, no matter how well-intentioned, cannot dictate to a school district, as part of her disabled child's IEP, how teachers will be trained or how their competency will be measured." Sioux Falls School Dist. v. Koupal, supra, 526 N.W.2d at 252.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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STATUTORY AND REGULATORY APPENDIX

34 C.F.R. Part 300

§ 300.15 **Qualified**

As used in this part, the term "qualified" means that a person has met SEA approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1417(b))

§ 300.16 **Related Services**

(a) As used in this part, the term "related services" means transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

* * *

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(Authority: 20 U.S.C. 1401(a)(17))

§ 300.153 **Personnel Standards**

(a) As used in this part:

(1) "Appropriate professional requirements in the State" means entry level requirements that--

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under this part to children and youth with disabilities who are served by State, local, and private agencies (see §300.2).

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that--

(i) Provides special education and related services to children with disabilities under this part;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each State plan must include policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State plan must include the steps the

State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education ore related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA, and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

(Authority: 20 U.S.C. 1413(a)(14))

§300.346 **Content of individualized education program.**

(a) *General.* The IEP for each child must include--

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) *Transition services.* (1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in §300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in §300.18(b)(2)(i) through (b)(2)(III), the IEP must include a statement to that effect and the basis upon which the determination was made.

(Authority: 20 U.S.C. 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

§300.380 **General**

Each State shall--

(a) Develop and implement a comprehensive system of personnel development that--

(1) Is consistent with the purposes of the Act and with the comprehensive system of personnel development described in 34 CFR § 303.360;

(2) Meets the requirements in §§300.381-300.383; and

(3) Is consistent with the provisions on personnel standards in § 300.153; and

(b) Include in its State plan a description of the personnel development system required in paragraph (a)(1) of this section.

(Authority 20 U.S.C. 1413 (a)(3), (a)(14))

ADMINISTRATIVE RULES OF SOUTH DAKOTA

Section 24:05:13 **Definitions**

24:05:13:01. **Definitions**

Terms defined in §24:03:01:01 and in SDCL 13-37-1 have the same meaning when used in this article. In addition, terms used in this article mean:

* * *

(16) "Related services," services that support the provision of special education, including transportation and those developmental, corrective, and other supportive services determined by a local placement committee to be required for an eligible child to benefit from special education.

Section 24:05:27:

Individual Educational Program

24:05:27:01. **Requirements for Individual Education Program.**

Each child's individual educational program shall incorporate multidisciplinary evaluation information and shall include, at a minimum, the following:

(1) The present level of educational performance;

(2) Annual goals and short-term instructional objectives;

(3) Special education and related services to be provided;

(4) The extent to which the child will be able to participate in the regular education programs;

(5) A statement of the needed transition services for the student, as defined in § 24:05:27:13.02, beginning no later than age 16, and a younger age if determined appropriate, including, as applicable, a statement of the interagency responsibilities or linkages, or both, before the student leaves the school setting.

If the placement committee determines that services are not needed in one or more of the areas specified in § 24:05:27:13.02, the IEP must include a statement to that effect and the reasons for such a determination.

(6) The projected date for initiation and the anticipated duration of services to be provided the child;

(7) Criteria for measurement and evaluation procedures and schedules for determining, at least annually, if short-term instructional objectives are being met;

(8) Justification for placement in other than the regular education programs; and

(9) A list of individuals responsible for implementing the individual educational program.